Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. .....

76-1837

PUNTA GORDA ISLES, INC., WILBER H. COLE, ALFRED M. JOHNS, ROBERT J. BARBEE, SAMUEL A. BURCHERS, JR., RUSSELL C. FABER, JOHN MATARESE, ROBERT C. WADE, EARL DRAYTON FARR, JR., JOHN W. DOUGLAS, D.D.S.,
Petitioners,

against

CECIL LIVESAY and DOROTHY LIVESAY, for Themselves and on Behalf of All Others Similarly Situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners respectfu'ly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action on March 4, 1977, as to which rehearing was denied on March 28, 1977. That judgment reversed an order of the United States District Court for the Eastern District of Missouri, which ruled that this action could not proceed as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure.

CITATIONS TO OPINIONS BELOW

The opinion and order of the United States District Court for the Eastern District of Missouri (not yet officially reported) are printed as Appendix B hereto. The opinion and judgment of the United States Court of Appeals for the Eighth Circuit (not yet officially reported), reversing the order of the District Court, are printed as Appendix C hereto. The memorandum of the Court of Appeals denying rehearing or rehearing *en banc* is printed as Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 4, 1977. Petitioners' timely petition for rehearing was denied on March 28, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is the order of the District Court determining that this action cannot be maintained as a class action a "final order" that can be appealed under 28 U.S.C. §1291?

STATUTES AND RULES INVOLVED

This case involves 28 U.S.C. §§1291, 1292 and Rule 23 of the Federal Rules of Civil Procedure, the texts of which are printed in Appendix A hereto.

STATEMENT OF THE CASE

The facts relevant to the issues presented by this petition are uncomplicated and uncontroverted.

The complaint in this action was filed in the United States District Court for the Eastern District of Missouri on July 27, 1973. The complaint asserts claims based on alleged violations of Sections 11, 12(2), and 17 of the Securities Act of 1933[1] and Section 10(b) of the Securities Exchange Act of 1934[2] and Rule 10b-5.[3] The claim asserted on behalf of the named plaintiffs is for approximately $2,650 plus interest; the complaint also asserts claims on behalf of the class described therein for several millions of dollars. The jurisdiction of the District Court is based on Section 22 of the Securities Act of 1933[4] and Section 27 of the Securities Exchange Act of 1934.[5]

On December 30, 1974, at the hearing on the plaintiffs' motion for an order that the action could proceed as a class action, the plaintiffs offered evidence that the class included, *inter alia*, one member with a claim of approximately $500,000 and another with a claim of approximately $140,000.

On June 19, 1975, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the District Court entered its order determining that the action could proceed as a class action.

On September 1, 1976, again pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, the District Court entered its order determining that the action could no longer be maintained as a class action.

The plaintiffs did not seek to appeal that order as an interlocutory order pursuant to 28 U.S.C. § 1292(b). Rather, they

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[1] 15 U.S.C. §§77k, 771(2), and 77q(a).

[2] 15 U.S.C. §78j(b).

[3] 17 C.F.R. §240.10b-5.

[4] 15 U.S.C. §77v.

[5] 15 U.S.C. §78aa.

based their appeal to the United States Court of Appeals for the Eighth Circuit on 28 U.S.C. § 1291, which applies only to "final decisions." The defendants filed a timely motion to dismiss the appeal for lack of jurisdiction, asserting that the order of the District Court was not a final decision.

The United States Court of Appeals for the Eighth Circuit found as a matter of fact that the individual claim of the plaintiffs was so small that they would not continue to prosecute the case unless the District Court's order was reversed. On the basis of this finding, it concluded that the order was a "final decision" and that it therefore had jurisdiction to hear the appeal.

On the merits of the case, the Court of Appeals held that the District Court had abused its discretion in determining that the action could not be maintained as a class action, and it reversed the District Court's order.

The defendants' motion for rehearing or rehearing *en banc* was denied.

REASONS FOR GRANTING THE WRIT

The Court Should Grant the Writ to Reconcile Conflicts Among the Circuits and to Resolve Questions of Importance for the Administration of Justice in the Federal Judicial System That Should Be But Have Not Been Decided by the Court, Because:

I. **The Decision of the Court of Appeals in This Case Conflicts With Decisions by the Courts of Appeals for the Seventh, Third, Ninth, and Fifth Circuits;**

II. **The Decision of the Court of Appeals in This Case Adopts a Doctrine That Results in the Inefficient Use of Judicial Manpower and an Improper Allocation of Judicial Functions; and**

III. **The Decision of the Court of Appeals in This Case Permits Piecemeal Appeals and Relaxes Congressionally-Imposed Restrictions on Appeals From Interlocutory Orders.**

I

The Decision of the Court of Appeals in This Case Conflicts With Decisions by the Courts of Appeals for the Seventh, Third, Ninth, and Fifth Circuits.

In an action brought as a class action, Rule 23(c)(1) requires the District Court to enter an order determining whether or not the action can be maintained as a class action. By the express terms of that rule, those orders are "conditional" and subject to subsequent change. Under the "death knell" doctrine, some orders entered pursuant to that rule are nevertheless considered to be "final decisions" that can be appealed under 28 U.S.C.

§ 1291; if the Court of Appeals finds that the plaintiffs will abandon the litigation if the order is not reversed, it regards the order as a "final decision." In this case the Court of Appeals adopted and applied the death knell doctrine.

The decision of the Court of Appeals in this case conflicts squarely with decisions of the Courts of Appeals for the Seventh and Third Circuits that unqualifiedly reject the death knell doctrine. In *King v. Kansas City Southern Industries, Inc.*[6] the Court of Appeals for the Seventh Circuit held that an order determining that an action could not proceed as a class action was not a final order and therefore could not be appealed under 28 U.S.C. § 1291. In a subsequent *en banc* decision, that court confirmed its rejection of the death knell doctrine.[7] In *Hackett v. General Host Corp.*,[8] the doctrine was rejected by the Court of Appeals for the Third Circuit, even though the claim of the named plaintiff in that case was for only $9. That court also confirmed its rejection of the doctrine in a subsequent *en banc* decision.[9]

In determining that the order in this case was a "final decision," the Court of Appeals refused to consider the fact that some members of the class (other than the named plaintiffs) had individual claims that were large enough to support litigation. Its decision, therefore, conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Hooley v. Red Carpet Corp. of America.*[10] There an appeal under 28 U.S.C. § 1291 was

[6] 479 F.2d 1259 (7th Cir. 1973).

[7] *Anschul v. Sitmar Cruises, Inc.*, 544 F.2d 1364 (7th Cir.), *cert. denied*, — U.S. — (1976).

[8] 455 F.2d 618 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

[9] *Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974).

[10] 549 F.2d 643 (9th Cir. 1977); see also *Share v. Air Properties G. Inc.*, 538 F.2d 279 (9th Cir.), *cert. denied sub nom. Woodruff v. Air Properties G. Inc.*, — U.S. — (1976).

denied because several members of the proposed class, other than the named plaintiffs, had claims that were large enough to be individually viable. The court held that: (1) the existence of those claims created a real possibility that the claims of the class would be litigated even if the named plaintiffs abandoned their action; and (2) that possibility precluded a finding that the order was final as to the claims of the class (as contrasted with the claims of the named plaintiffs). In this case the Court of Appeals declined to follow *Hooley*, even though the record here clearly shows that other members of the proposed class have very substantial claims (and the court's attention was directed to the *Hooley* decision on the motion for rehearing).

In this case the Court of Appeals did not give the parties an opportunity to offer evidence on the finality issue. The decision of the Court of Appeals in this case, therefore, is in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Gosa v. Securities Investment Co.*[11] There the court recognized the difficulties and dangers of an attempt by an appellate court to make the initial finding of fact on the issue of finality. That issue was not before the trial court when it ruled upon the class action issues, and the record on appeal therefore will not contain all the possible evidence relevant to that issue. In *Gosa* the appeal was remanded to the District Court with instructions to hear evidence on the finality issue. In this case, the Court of Appeals expressly declined to follow *Gosa*.

Although the death knell doctrine has been rejected by the Seventh and Third Circuits, and substantially modified in the Ninth and Fifth Circuits, it has been adopted by the Second and Sixth Circuits,[12] as well as the Eighth Circuit in this case.

[11] 449 F.2d 1330 (5th Cir. 1971); but see *Graci v. United States*, [illegible] F.2d 124 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973), in which an evidentiary hearing was not required.

[12] *E.g., Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143 (6th Cir. 1975); *cf. Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975).

But even in the Second Circuit the doctrine has received harsh criticism; in his concurring opinion in *Parkinson v. April Industries, Inc.*,[13] Judge Friendly concluded that the doctrine should be abandoned.

This Court should resolve these conflicts among the Circuits.

II

The Decision of the Court of Appeals in This Case Adopts a Doctrine That Results in the Inefficient Use of Judicial Manpower and an Improper Allocation of Judicial Functions.

As generally applied, and as applied by the Court of Appeals in this case, the death knell doctrine requires the Court of Appeals to make the initial finding of fact on the issue of finality: "Will the plaintiffs decide not to prosecute if we do not reverse the district court's order?" This is an inefficient use of judicial manpower and an improper allocation of judicial functions; an appellate court should not make the initial finding of fact on a complex issue that was never considered by the District Court.

None of the issues before the District Court required evidence on the finality issue, and the parties never had an appropriate opportunity to offer evidence on that issue. Consequently, although the record may, by coincidence, contain some evidence relevant to the finality issue, it will not contain all the evidence relevant to that issue that the parties would have offered if they had been given an opportunity.

The death knell doctrine requires the appellate court to predict whether the plaintiffs will continue the litigation if the trial court's order is not reversed. A realistic approach to this prediction would require consideration of many factors, such as

[13] 520 F.2d 650, 658 (2d Cir. 1975).

the plaintiffs' estimate of the probability of success on the merits, the possibility of intervention or other assistance by other members of the class, the willingness of plaintiffs' counsel to advance the costs and expenses, and the amount of trial preparation that had been accomplished before the decision on the class action issues. In this case and in most cases the record simply does not contain any evidence concerning these factors. An appellate court should not speculate about these factors in determining whether it has jurisdiction to hear an appeal from a Rule 23(c)(1) order. A better allocation of judicial functions—and a more efficient use of manpower—would be for the trial court, after a hearing, to make the initial finding on the issue of finality. The procedures of the appellate court are ill-adapted to make that finding correctly and efficiently.

The death knell doctrine may create judicial inefficiencies in an additional way. As Judge Friendly observed,[14] only plaintiffs can appeal from an order determining that an action should not proceed as a class action; defendants generally cannot appeal a decision that permits an action to proceed as a class action. The one-sidedness permits immediate appellate control over too grudging an application of the class action criteria of Rule 23, but it defers any appellate control over too lenient an application of those criteria. The imbalance tends to increase the number of class actions pending in the federal court system.

III

The Decision of the Court of Appeals in This Case Permits Piecemeal Appeals and Relaxes Congressionally-Imposed Restrictions on Appeals From Interlocutory Orders.

The death knell doctrine measures the finality of an order by its effect on the plaintiffs' willingness to litigate, rather than by

[14] *Id.* at 659.

the juridical effect of the order itself. If applied outside the class action context, the doctrine would permit a plaintiff to appeal from any order if he could convince the appellate court that he would not continue to litigate unless his appeal was allowed. The doctrine runs directly counter to the fundamental policy against piecemeal appeals from interlocutory orders.

The classic expression of the principles that underlie that policy is found in Mr. Justice Frankfurter's opinion in *Cobbledick v. United States*.[15] More recently Judge Adams thoughtfully examined those principles in *Bachowski v. Usery*:

> [T]he wisdom of the final judgment rule lies in its insistence that we focus on systemic, as well as particularistic impacts. The appellate system has become increasingly overburdened and the future would appear to promise no relief from the continuous increase in case loads. Accordingly, it would seem to us to be a disservice to the Court, to litigants in general and to the idea of speedy justice if we were to succumb to enticing suggestions to abandon the deeply-held distaste for piecemeal litigation in every instance of temptation. Moreover, to find appealability in those close cases where the merits of the dispute may attract the deep interest of the court would lead, eventually, to a lack of principled adjudication or perhaps the ultimate devitalization of the finality rule as enacted by Congress.[16]

Congress considered appellate review of interlocutory orders when it enacted 28 U.S.C. § 1292. Subsection (a) of that statute lists the kinds of interlocutory orders that can be appealed as a matter of right; the list is narrow and does not include class action determinations. Subsection (b) permits an appeal, subject to certain conditions, from an interlocutory order

[15] 309 U.S. 323, 324-325 (1940).

[16] 545 F.2d 363, 373-374 (3d Cir. 1976).

of a kind not listed in subsection (a). In many and perhaps most cases in which a district court finds that an action should not proceed as a class action, that finding could be appealed under 28 U.S.C. § 1292(b). There is some risk that the district judge will refuse in such a case to include the requisite findings in his order. However, as Judge Friendly observed in *Parkinson v. April Industries, Inc.*, mandamus may well be available in such cases.[17] Moreover, any member of the class can seek to intervene individually after a decision that the action cannot be maintained as a class action.

Appeals under 28 U.S.C. § 1292(b) are free from the defects of the death knell doctrine. They require no fact finding at the appellate level from inadequate and incomplete records. The statutory procedure is not one-sided and creates no bias in favor of class actions.

SUMMARY

In summary, the death knell doctrine produces inefficiencies in the allocation of judicial manpower and functions within the federal judicial system. It requires an appellate court to make an initial finding of fact on a complex issue from a sometimes extensive record addressed to other issues. Because it permits immediate appellate control of denials of class action status but not of grants of class action status, the doctrine may increase the number of class actions in the federal judicial system.

The shortcomings of the doctrine resulted in its rejection by two Courts of Appeals, both of which confirmed that rejection in later *en banc* decisions. In addition, two other Courts of

[17] 520 F.2d 650, 658 (2d Cir. 1975).

Appeals have attempted to avoid some of the problems in the application of the doctrine by significantly modifying it. These modifications have not been applied by other Courts of Appeals, and the Court of Appeals for the Eighth Circuit in this case expressly declined to adopt either of those modifications.

Because of the increasing impact of class actions on the efficient administration of justice, the long-standing antipathy of the courts and Congress to piecemeal apepals, and the need for uniformity in the federal system, the death knell doctrine is ripe for review by this Court. We should not have one rule for litigants in St. Louis and New York, and exactly the opposite rule for litigants in Chicago and Philadelphia—with yet another for litigants in Los Angeles and San Francisco, and perhaps a fourth rule for litigants in Atlanta and New Orleans. This case provides an opportunity for the Court to weigh the opposing considerations that have caused some Courts of Appeals to reject totally the death knell doctrine and that have caused others to adopt it in significantly varying forms. The results of that consideration by this Court will be uniformity and efficiency in the administration of justice.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

28 U.S.C. § 1291.—Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292.—Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Rule 23, F.R.Civ.P.—Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice

to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing

conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

APPENDIX B

In the United States District Court for the
Eastern District of Missouri
Eastern Division

Cecil and Dorothy Livesay,
Plaintiffs,
v.
Punta Gorda Isles, Inc., et al.,
Defendants.
No. 73 C 517 (3)

Order

(Filed September 1, 1976)

In accordance with the Memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that the motion of the various defendants to decertify this case as a class action be and is GRANTED; and

IT IS FURTHER ORDERED that this action be and is decertified as a class action; and

IT IS FURTHER ORDERED that this matter shall proceed to trial only upon the individual claims of Cecil and Dorothy Livesay; and

IT IS FURTHER ORDERED that this action shall be set for trial at a later date; and

IT IS FURTHER ORDERED that all restrictions on discovery shall be lifted, and that discovery with regards to the individual claims of Cecil and Dorothy Livesay shall proceed in a normal fashion.

Dated this 1st day of September, 1976.

/s H. KENNETH WANGELIN
United States District Judge

Memorandum

(Filed September 1, 1976)

This matter is before the Court upon the motion of the various defendants to decertify this lawsuit as a class action.

The basis of the various defendants' motion is that the plaintiffs, as class representatives, are failing to prosecute this action, and are therefore denying the defendants a right to a speedy adjudication of the claims against them.

In order to deal with the defendants' motion, a brief chronology of events is required. This lawsuit was originally filed on July 27, 1973. Plaintiffs' original counsel did not seek a class action hearing until April 9, 1974. On June 19, 1975, this Court, in a Memorandum and Order, declared that the action should proceed as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure. The delay between the class action hearing, and this Court's certification was due to the substitution of new counsel for plaintiffs. On October 23, 1975, this Court partially dissolved its stay order regarding discovery, and allowed discovery to proceed as to the names and addresses of the members of the class so that the appropriate class action notice could be sent. The plaintiffs did not institute discovery

to determine the names and addresses of the absent class members until July 20, 1976.

It is the opinion of the Court that the plaintiffs have failed to offer adequate excuses for their delay in prosecuting this action as a class action. In response to the motion of the defendants, the plaintiffs have alleged that it is anomalous for the defendants to attempt to protect the interests of the members of the class. The Court agrees that such concern on the part of the defendants involves tears of the crocodilian variety, however, the plaintiffs misjudged the true thrust of the defendants' motion. The defendants are merely seeking, as is their right, to have a speedy adjudication of the claims against them. Since this lawsuit has been pending for approximately three years, and class action notices have not gone out more than a year after the action was certified as a class action, the Court is forced to the conclusion that there has been a lack of prosecution on the part of the plaintiffs as class representatives.

Since the plaintiffs seem to have no desire to prosecute this matter as a class action, the Court will decertify this matter as a class action, and the lawsuit shall proceed on the individual claims of Cecil and Dorothy Livesay as stated in the accompanying Order.

Dated this 1st day of September, 1976.

/s/ H. KENNETH WANGELIN
United States District Judge

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 76-1881

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Plaintiffs-Appellants,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Missouri

No. 76-1906

Cecil Livesay and Dorothy Livesay, for Themselves and on Behalf of All Others Similarly Situated,
Petitioners,

v.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John

W. Douglas, D.D.S., Coopers & Lybrand (Formerly Lybrand, Ross Bros. & Montgomery),

and

Honorable H. Kenneth Wangelin, United States District Judge,
Respondents.

Petition for Writ of Mandamus

Submitted: January 13, 1977

Filed: March 4, 1977

Before HEANEY and STEPHENSON, Circuit Judges, and STUART,* District Judge.

STEPHENSON, Circuit Judge.

In these consolidated cases, Cecil and Dorothy Livesay (plaintiffs) seek review of the district court's order decertifying their action as a class action. In No. 76-1881, plaintiffs appeal from that order. In No. 76-1906, plaintiffs seek a writ of mandamus compelling the district court to vacate its decertification order.

On July 27, 1973, plaintiffs filed a complaint seeking approximately $2650 in individual damages resulting from their purchase of $5000 worth of debentures and 100 shares of common stock issued by Punta Gorda Isles, Inc. (Punta Gorda), a Florida land development corporation, pursuant to a registration statement and prospectus dated May 2, 1972. The essence of plaintiffs' claim was that the prospectus and registration statement contained materially misleading statements and omissions.[1] The

* The Honorable William C. Stuart, United States District Judge for the Southern District of Iowa, sitting by designation.

[1] Essentially, the complaint alleges: (1) a failure to disclose that new accounting rules of the American Institute of Certified Public Accountants would require an adverse restatement of earnings for 1967-1972; (2) a failure to disclose that the earnings consisted of installment sale contracts where cash would not be received until future dates; (3) a misleading statement of the ratio of earnings to fixed charges because not based on actual cash flow; and (4) a failure to disclose that certain Florida ecological regulations would seriously impede Punta Gorda from developing artificial waterfront property.

named defendants were Punta Gorda, certain individuals who were officers and directors of Punta Gorda, and the accounting firm of Coopers & Lybrand (Coopers), which had certified the financial statements in the registration statement and prospectus. Plaintiffs sought to represent a class of approximately 1,800 persons who had purchased securities at the May 2, 1972, public offering.

On April 9, 1974, plaintiffs moved pursuant to Fed. R. Civ. P. 23 to have the action certified as a class action. On May 13, 1974, the district court granted Coopers' motion for a stay of all discovery except discovery relating to the class action determination. On June 24, 1974, oral argument on the class action certification motion was held. On July 16, 1974, the district court denied Coopers' motion to strike the class action allegations in the complaint, but did not at that time certify the class. On September 23, 1974, the district court denied plaintiffs' motion to lift the stay on substantive discovery.

On November 1, 1974, plaintiffs filed a petition for a writ of mandamus in this court, requesting that the district court be ordered to lift the stay on substantive discovery. This court denied the petition by order dated November 15, 1974, but expressed the view that plaintiffs should request a prompt ruling on their motion for class action certification and that the district court should promptly rule on the motion and thereafter permit discovery on the merits. *Livesay v. Punta Gorda Isles, Inc.*, No. 74-1827 (8th Cir., November 15, 1974).

On December 30, 1974, an evidentiary hearing on the class action certification motion was held in the district court. On June 19, 1975, the district court entered an order certifying the action as a Rule 23(b)(3) class action, which order expressly found plaintiffs to be adequate class representatives. The order also held that plaintiffs' counsel had a conflict of interest because he had represented one of the underwriters of the Punta Gorda offering on unrelated matters. The order deemed this conflict serious because none of the underwriters had been joined as defendants in the plaintiffs' suit. Plaintiffs' counsel withdrew, and on June 30, 1975, plaintiffs' current counsel entered its appearance.

On July 25, 1975, plaintiffs moved to dissolve the stay on substantive discovery. Coopers opposed the motion and sought a reconsideration of the order certifying the action as a class action. On October 23, 1975, the district court denied plaintiffs' motion to dissolve the stay. In its order, the district court expressed concern about the adequacy of plaintiffs as class representatives, based largely on plaintiffs' failure to join any underwriters as defendants. The court did not, however, decertify the class action at that time, because it believed that such decertification might jeopardize the claims of absent class members. The court directed the parties to prepare forms of notice of the pendency of the class action to be mailed to the class members and also lifted the stay on discovery to the extent that plaintiffs could seek the names and addresses of the class members. The parties submitted proposed forms of notice in November 1975.

On March 1, 1976, the district court mailed to the parties its proposed form of notice. Both parties submitted suggested changes, and on April 9, 1976, the district court mailed to the parties the final form of notice.

On April 20, 1976, plaintiffs' counsel telephoned counsel for Punta Gorda and requested the names and addresses of the

initial registered owners (after the underwriters) of the debentures and common stock sold pursuant to the May 2, 1972, registration statement. By letter dated April 21, 1976, Punta Gorda's counsel declined to furnish that information.

On July 9, 1976, plaintiffs requested the district court to conduct a conference for the purpose of discussing the issues involved in discovery of the names of class members. On July 20, 1976, plaintiffs served defendants with a motion to produce the names and addresses of the initial registered owners of the stock and debentures. On July 23, 1976, Coopers filed a motion to decertify the action as a class action. On July 26, 1976, the conference requested by plaintiffs was held at which the district court ordered the parties to submit briefs, etc. in support of the various pending motions.

On September 1, 1976, the district court issued a memorandum and order decertifying the class action. The court found that plaintiffs had inordinately delayed in prosecuting the case and were thus not adequate class representatives. The order also lifted the stay on substantive discovery. Subsequently, both parties have engaged in some discovery on the merits. Plaintiffs now seek review of the September 1 decertification order by direct appeal (No. 76-1881) and by a petition for a writ of mandamus (No. 76-1906).

We are confronted with the threshold issue of our jurisdiction to hear an appeal from the district court's order decertifying the lawsuit as a class action. Defendants allege that the order is not a final order which is appealable under 28 U.S.C. § 1291. We disagree.

Orders denying class action certification are reviewable under 28 U.S.C. § 1291 if they sound the "death knell" of the action. *See, e.g., Share v. Air Properties G. Inc.*, 538 F.2d 279, 282 (9th Cir.), *cert. denied sub nom., Woodruff v. Air Properties*

G. Inc., 97 S.Ct. 321 (1976); *Ott v. Speedwriting Pub. Co.*, 518 F.2d 1143, 1146-49 (6th Cir. 1975); *Williams v. Mumford*, 511 F.2d 363, 366 (D.C. Cir.), *cert. denied*, 423 U.S. 828 (1975); *Shayne v. Madison Square Garden Corp.*, 491 F.2d 397, 399-401 (2d Cir. 1974); *Graci v. United States*, 472 F.2d 124, 126 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); *Eisen v. Carlisle & Jacquelin* (*Eisen I*), 370 F.2d 119, 120-21 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967). *See also Hartmann v. Scott*, 488 F.2d 1215, 1220 (8th Cir. 1973); *compare, In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975). *Contra, King v. Kansas City Southern Industries*, 479 F.2d 1259, 1260 (7th Cir. 1973); *Hackett v. General Host Co.*, 455 F.2d 618, 621-26 (3d Cir.), *cert. denied*, 407 U.S. 925 (1972).

To determine whether a decertification order sounds the "death knell" of the action, we begin by examining the amount of the class representatives' individual claim.[2] Plaintiffs' individual claim for damages totals approximately $2,650. Because this claim falls between those cases where the individual claim is clearly not viable[3] and those cases where the individual claim

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[2] Defendants allege that because the record reveals other members of the purported class who have substantial individual claims, the "death knell" doctrine should not apply. That was the result reached in *Share v. Air Properties G. Inc., supra*, 538 F.2d at 283. We do not consider the soundness of that holding, however, because the case is distinguishable on its facts. In *Share* the court referred to class members who were "actively engaged" in the litigation. Here, the record reveals only that certain class members had indicated a willingness to pay part of the expenses of suit, and even that tangential involvement ceased after the appearance of plaintiffs' new counsel.

[3] *See, e.g., Ott v. Speedwriting Pub. Co., supra* ($30); *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971) ($386); *Green v. Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969) ("less than $1000"); *Eisen v. Carlisle & Jacquelin, supra* ($70).

is viable,[4] we must examine the amount of plaintiffs' claim in relation to their financial resources and the probable cost and complexity of the lawsuit. *See, e.g., Share v. Air Properties G. Inc., supra*, 538 F.2d at 282; *Graci v. United States, supra*, 472 F.2d at 126; *Korn v. Franchard Corp.*, 443 F.2d 1301, 1307 (2d Cir. 1971).

Plaintiffs, both of whom are employed, have an aggregate yearly gross income of $26,000. Their total net worth is approximately $75,000, but only $4,000 of this sum is in cash. The remainder consists of equity in their home and investments.

As of December 1974 plaintiffs had already incurred expenses in excess of $1,200 in connection with this lawsuit. Plaintiffs' new counsel has estimated expenses of this lawsuit to be $15,000. The nature of this case will require extensive discovery, much of which must take place in Florida, where most defendants reside. Moreover, the allegations regarding the prospectus and financial statements will likely require expert testimony at trial.

After considering all the relevant information in the record, we are convinced that plaintiffs have sustained their burden[5]

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[4] *See, e.g., Shayne v. Madison Square Garden Corp., supra* ($7,482); *Falk v. Dempsey-Tegeler & Co.*, 472 F.2d 142 (9th Cir. 1972) ($14,125); *Milberg v. Western Pac. R.R.*, 443 F.2d 1301 (2d Cir. 1971) ($8,500).

[5] Plaintiffs who seek to invoke the "death knell" doctrine have the burden of developing, in the trial court, an adequate factual record upon which an appellate court may determine whether the action will proceed absent class certification. *Share v. Air Properties G. Inc., supra*, 538 F.2d at 282; *Gosa v. Securities Investment Co.*, 449 F.2d 1330 (5th Cir. 1971). As the *Gosa* court indicated, the preferable way to do this is in a post-ruling hearing where the district court has the opportunity to enter appropriate findings of fact. No such hearing was held in the instant case. However, we do not read *Gosa* as requiring such a hearing in all cases. In the instant case, the record of the entire proceeding contains sufficient facts to allow us to make an informed judgment on the matter.

of showing that they will not pursue their individual claim if the decertification order stands. Although plaintiffs' total net worth could absorb the cost of this litigation, "it [takes] no great understanding of the mysteries of high finance to make obvious the futility of spending a thousand dollars to get a thousand dollars—or even less." Douglas, *Protective Committees in Railroad Reorganizations*, 47 Harv. L. Rev. 565, 567 (1934). We conclude we have jurisdiction to hear the appeal.

The district court has wide latitude in determining whether an action may be maintained as a class action. If the court applies the proper criteria in making this determination, its decision is reviewable only for an abuse of discretion. *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1061 (8th Cir. 1975); *Shumate v. Nat'l Ass'n of Securities Dealers*, 509 F.2d 147, 155 (5th Cir.), *cert. denied*, 423 U.S. 868 (1975); *Kamm v. California City Development Co.*, 509 F.2d 205, 210 (9th Cir. 1975); *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 245 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *City of New York v. Int'l Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

Because the decertification order in this case was predicated solely on the finding that plaintiffs were not adequate class representatives because they had inordinately delayed in prosecuting the litigation,[6] the sole issue[7] on this appeal may be

[6] As plaintiffs correctly point out, the decertification order was phrased in terms of a denial of defendants' rights to a speedy adjudication of claims against them. This factor is not a proper criterion to consider in determining whether plaintiffs will adequately represent the members of the class. However, a review of the entire record convinces us that the district court was concerned with plaintiffs' failure to prosecute the case as it related to their adequacy as class representatives.

[7] Plaintiffs also seek to raise the following issues: (1) that the decertification order was erroneously predicated on plaintiffs' failure to join underwriters as defendants; (2) that the district court exhibited a lack of fair and impartial judicial procedure; (3) that the district court ordered plaintiffs to follow class action procedures which violate the federal rules; and (4) that the district court violated this court's mandate by not promptly lifting the stay on substantive discovery after certifying the class. The first two claims are devoid of factual support in the record. The third claim is relevant to the decertification order only insofar as it alleges that the class action procedures authorized by the district court impeded the progress of the litigation. As such, it merely restates the allegation that the delay was not caused by plaintiffs. The final claim is moot because the decertification order lifted the stay on substantive discovery. Moreover, as with the third claim, its only relevance to the decertification order is the allegation that the stay of discovery was a contributing cause of the delay.

simply stated: was the district court's decertification order finding plaintiffs to be inadequate class representatives so erroneous as to constitute an abuse of discretion? We answer the question in the affirmative, and we reverse.

The decertification order was apparently based upon three distinct periods of delay. The first period of delay was approximately eight months from the date of filing the complaint until the plaintiffs moved to have the action certified as a class action. The record indicates that this period of time was largely devoted to preparing and amending pleadings and engaging in discovery. We note that plaintiffs filed their motion to certify shortly after defendants filed their last responses to plaintiffs' interrogatories. In these circumstances, we find little to support a finding that plaintiffs were dilatory in moving for class action certification. Furthermore, the general rule is that a delay prior to moving for class action certification is not a basis for refusing certification absent some showing of prejudice. *See, e.g., Bernstein v. National Liberty Int'l Corp.*, 407 F. Supp. 709, 714 (E.D. Pa. 1976); *Souza v. Scalone*, 64 F.R.D. 654, 656 (N.D. Cal. 1974); *Boring v. Medusa Portland Cement Co.*, 63 F.R.D. 78, 80 (M.D. Pa.), *appeal dismissed without opinion*, 505 F.2d 729 (3d Cir. 1974); *Feder v. Harrington*, 52 F.R.D. 178, 181-82 (S.D.N.Y. 1970); *Epstein v. Weiss*, 50 F.R.D. 387, 392 (E.D. La. 1970). No showing of prejudice was made here.

The second time period referred to in the decertification order was the 14 month period between the motion for class action certification and the order certifying the class. The district court's decertification order attributed this delay to the appointment of new counsel for plaintiffs. However, it should be noted that new counsel for plaintiffs did not appear until *after* the order certifying the class was entered.

The defendants' only colorable allegation of delay during this second period is that plaintiffs were dilatory in moving for an evidentiary hearing on the class action motion. The record discloses that the district court indicated during oral argument that an evidentiary hearing should be held if the court decided that the issue of individual reliance did not bar maintaining the suit as a class action. This decision was reached on July 16, 1975, and plaintiffs did not seek an evidentiary hearing until September 20, 1975, a period of nine weeks. During this nine-week period plaintiffs were not inactive. They moved to enjoin the destruction of documents and also moved to lift the stay on substantive discovery. We cannot say, and the district court did not find, that pursuing these avenues was a sign of inaction, negligence, or a failure adequately to protect the interests of other class members.

The third period of time mentioned in the decertification order is the period from the district court order allowing discovery of the names and addresses of class members until plaintiffs first sought to discover that information.[8] This period runs

[8] A persuasive argument can be made that this is the only period of delay upon which the decertification order could properly be predicated. Because the first two periods of delay occurred prior to the certification order, defendants could have raised the issue of failure to prosecute at that time, but did not. They may now be foreclosed from raising the issue based on these delays. *Kramer v. Scientific Control Corp.*, 67 F.R.D. 98, 99 (E.D. Pa. 1975), *rev'd in part on other grounds*, 534 F.2d 1085 (3d Cir.), *cert. denied sub nom., Arthur Andersen & Co. v. Kramer*, 97 S.Ct. 90 (1976). *Cf. In re Cessna Aircraft Distributorship Antitrust Litigation*, 518 F.2d 213, 215 (8th Cir.), *cert. denied*, 423 U.S. 947, *rehearing denied*, 423 U.S. 1039 (1975).

from October 23, 1975, to April 20, 1976, when plaintiffs first requested Punta Gorda's counsel to furnish the names and addresses of the initial registered owners of the securities. Defendants contend that because plaintiffs have offered no compelling excuse for failing to request this information more promptly, this delay *ipso facto* justified the district court's finding that plaintiffs are inadequate representatives. We disagree.

We begin by noting that there has been no showing that plaintiffs' failure to request production of this information at an earlier date has prejudiced the class members. The notices to the class members could not have gone out until the final form of notice was approved by the court, which did not occur until April 9, 1976. Eleven days later, plaintiffs' attorney telephoned counsel for Punta Gorda and requested that Punta Gorda furnish the names and addresses of the initial registered owners of the securities in question. In a letter dated August 4, 1975, counsel for Punta Gorda had agreed to furnish this information. However, in response to the telephone call, counsel for Punta Gorda wrote a letter to plaintiffs' counsel refusing to furnish this information.[9] In these circumstances we cannot agree that plaintiffs were dilatory in seeking the names and addresses of potential class members. They had every right to expect that defendants would promptly furnish this information. To hold that plaintiffs are inadequate class representatives because they failed to anticipate defendants' eventual objections to discovery would be tantamount to saying that class representatives must be gifted with prescience. This we decline to do.

That there has been undue delay in this lawsuit is beyond question. From examination of the entire record of this pro-

[9] This refusal was later formalized in objections to plaintiffs' motion to produce. One of the objections to this motion was that the requested information was not in the possession of Punta Gorda, but in the possession of Punta Gorda's transfer agent. Because the transfer agent could only release this information at the direction of Punta Gorda, we find this objection little else than a delaying tactic.

tracted proceeding, however, it becomes quite clear that much of the delay in this case is directly attributable to defendants. For example, defendants have been granted 14 extensions of time, totalling approximately 190 days, in which to file pleadings, motions and other papers. In addition, defendants have filed motions to reconsider or modify earlier court orders, which motions have consistently alleged grounds previously ruled upon by the court. The clear import of this course of conduct is to make this lawsuit as time-consuming and costly as possible.

In addition, the district court has on some occasions taken action which did not advance the progress of this litigation. The court took approximately five months to decide the class action certification motion after the evidentiary hearing was held. The court took approximately four months to approve the form of notice to the class members. These delays appear to have been justifiable due to the complex nature of the questions presented. However, during this time there was a stay of substantive discovery in effect. The practical effect of this stay was to prevent the parties from concurrently proceeding to the merits while the court considered the various procedural questions. In these circumstances, virtually all the plaintiffs could do to advance the course of this litigation was to attempt to lift the stay on discovery. Plaintiffs twice sought to lift this stay and were twice unsuccessful.

We conclude that the district court order decertifying the action as a class action because of plaintiffs' failure to prosecute is wholly unsupported by the record, and we accordingly reverse. We do not disturb that portion of the order which lifted the stay on substantive discovery.

The record in this case compels us to make certain further comments. We are dismayed at the utter lack of cooperation between opposing counsel. The record is replete with instances

where relatively minor procedural matters have mushroomed into full-scale confrontations, with the concomitant avalanche of briefs, memoranda, etc. By and large, these matters could, and should, have been settled informally by the parties or, if necessary, in conference with the district court.

Even more disturbing is the tone with which these proceedings have been conducted. All too often the parties have engaged in personal attacks on opposing counsel and the district court. These baseless allegations are not a substitute for advocacy based on the facts and the law and they have no place in our judicial system.

On remand, we anticipate that this conduct will not reoccur. If it does, the district court will be forced to take a more active role in managing this case to insure that it progresses as expeditiously as possible consistent with fairness to the parties. *See Manual for Complex Litigation* § 1.10 (1973).

In No. 76-1881, the order of the district court is reversed and the cause remanded for further proceedings consistent herewith. In No. 76-1906, the petition for writ of mandamus is dismissed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
for the Eighth Circuit

No. 76-1881 September Term, 1976

Cecil Livesay and Dorothy Livesay, for themselves and on behalf of all others similarly situated,

Appellants,

vs.

Punta Gorda Isles, Inc., Wilber H. Cole, Alfred M. Johns, Robert J. Barbee, Samuel A. Burchers, Jr., Russell C. Faber, John Matarese, Robert C. Wade, Earl Drayton Farr, Jr., John W. Douglas, D.D.S., Coopers & Lybrand (formerly Lybrand, Ross Bros. & Montgomery),

Appellees.

JUDGMENT

(Filed April 13, 1977)

Appeal From the United States District Court for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for proceedings consistent with the opinion of this Court.

March 4, 1977

A true copy

Attest: /s/ Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit

April 13, 1977

APPENDIX D

United States Court of Appeals
for the Eighth Circuit

76-1881 September Term, 1976

Cecil Livesay, et al., etc.,
Appellants,
vs.
Punta Gorda Isles, Inc., et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petitions for rehearing en banc filed by counsel for appellees and, being fully advised in the premises, it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

March 28, 1977